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No. 84-823

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE NO. 462

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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32 pp

QUESTION PRESENTED

Whether the Fifth Amendment privilege against compelled self-incrimination protects the contents of an individual's voluntarily prepared financial records.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 745 F.2d 834. The opinion of the district court (Pet. App. 13a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a) was entered on September 24, 1984. The petition for a writ of certiorari was filed on November 21, 1984, and granted on January 21, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

1. From the summer of 1983 to the present, a federal grand jury in Alexandria, Virginia, has investigated a variety of narcotics, tax, and currency violations believed to have occurred from 1974 to 1985. Respondent was and is a target of the investigation, which has explored evidence that he and others distributed large quantities of marijuana and hashish in the Eastern District of Virginia and elsewhere in the United States. Internal Revenue Service agents have assisted the investigation to determine, inter alia, whether respondent's participation in the narcotics enterprise yielded unreported income. See Pet. App. 2a.

In March 1984, the grand jury caused a subpoena to be served on respondent directing him to appear before the grand jury on April 17, 1984, and to bring with him a variety of documents (Pet. App. 17a-20a). The items demanded encompass approximately a dozen kinds of common financial records, including records of real estate transactions, bank statements, cancelled checks, loan agreements, brokerage account records, and credit card receipts. The subpoena also required respondent to furnish records of payments made to attorneys, funds deposited with attorneys or law firms, and records of the purchase, sale, or distribution of controlled substances, including documents naming suppliers and customers. In addition, the subpoena demanded production of financial rec-

ords maintained by respondent's businesses, including sole proprietorships.

Respondent agreed to furnish the records of his businesses, but he moved to quash the remainder of the subpoena, asserting (1) that it was overbroad and sought production of material irrelevant to the investigation and (2) that the required production of "personal" records violated his Fifth Amendment privilege against self-incrimination. See C.A. App. 7-8. The government responded by offering act-of-production immunity with respect to the records covered by the claims of privilege. See Pet. App. 1a-2a, 5a. The district court rejected respondent's argument concerning overbreadth and irrelevance. However, the court granted the motion to quash that part of the subpoena requiring respondent to produce "his personal, as opposed to his business[] records" (Pet. App. 13a). In response to the government's argument that the contents of preexisting records are not protected by the Fifth Amendment privilege, as interpreted in *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), the court stated (Pet. App. 13a n.1) that *Doe* "concerned only business records." The court observed (*ibid.*) that "the logical extension" of *Doe* "is to exempt private papers from Fifth Amendment protection." The court acknowledged that *Boyd* v. *United States*, 116 U.S. 616 (1886), which held that the contents of "private papers" are protected by the Fifth Amendment privilege, had been "discredited insofar as business records are concerned" (Pet. App. 13a n.1), but it nevertheless felt "obliged" to follow *Boyd* until it was expressly overruled.

The court directed respondent to furnish for in camera inspection a list of all documents asserted to be personal, together with sufficient identification to

enable the court to determine whether the particular listed document was a "personal" or a "business" record. See Pet. App. 13a. At the same time, and at the government's unopposed request, the court granted respondent formal immunity for the act of producing the documents, pursuant to 18 U.S.C. 6002 and 6003. C.A. App. 57-58; see Pet. App. 1a-2a, 5a.

Following its inspection of the list respondent furnished, the court concluded that the documents designated were "clearly * * * personal" and therefore exempt from production to the grand jury (Pet. App. 13a). The court noted that, "[i]ronically many of the documents consist of checks, vouchers or [other] documents, the original or copies of which are in the hands of third parties. These probably could be obtained from the third parties by a grand jury subpoena if the government knew their whereabouts" (Pet. App. 13a-14a).[1]

2. The court of appeals affirmed (Pet. App. 1a-12a), relying (*id.* at 7a) on "the long-standing holding of the Supreme Court, first enunciated in *Boyd*." The court noted that *Boyd* had refused to recognize any substantial difference between the "seizure of a man's private books and papers" and "compelling him to be a witness against himself." Pet. App. 8a-9a, quoting *Boyd*, 116 U.S. at 633. The court then quoted *Boyd*'s statement (116 U.S. at 634-635) that "compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself,

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[1] The district court did not, however, regard the availability of respondent's personal papers to third parties as constituting a waiver of respondent's Fifth Amendment privilege (Pet. App. 14a).

within the meaning of the Fifth Amendment to the Constitution." Pet. App. 9a.

The court of appeals observed (Pet. App. 9a) that statements in several decisions of this Court, culminating with the decision in *Bellis* v. *United States*, 417 U.S. 85 (1974), "reaffirmed *Boyd's* essential holding." The court then stated (Pet. App. 10a) that "[n]o later decision of the Supreme Court has held to the contrary on the point directly in issue" and that none of this Court's more recent decisions "has overruled *Boyd*." Specifically, the court believed that "dicta" in *Fisher* v. *United States*, 425 U.S. 391 (1976), and *Doe* did not require a different result because "[t]he *Fisher* Court took pains to distinguish *Boyd*," while *Doe* "merely reiterated the well-established premise that an individual holding the documents of an artificial entity, whether a corporation, partnership or sole proprietorship, cannot assert a fifth amendment privilege." Pet. App. 10a.

The court rejected the government's argument that the subpoenaed documents were not personal in any meaningful sense and were indistinguishable from the financial records at issue in *Doe*. The court did not disagree with the proposition that the records were essentially identical to the proprietor's records in *Doe*, but it declined "to engage in a case-by-case content-based determination of the privacy interest attendant to a given document. The proper line, we feel, has been drawn—whether the documents are held in an individual or representative capacity" (Pet. App. 11a n.12).

3. On January 9, 1985, the grand jury returned a 48-count indictment charging respondent and 25 others with various violations of the federal narcotics,

firearms, tax, and currency laws (J.A. 3-64).[2] Other possible violations are still under investigation.[3]

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[2] Respondent was named in 24 counts. He was charged with conspiracy to distribute marijuana, in violation of 21 U.S.C. 846 (Count 1); engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 2); possession with intent to distribute over 14 tons of marijuana and hashish, in violation of 21 U.S.C. 841(a)(1) (Counts 3, 4, 5, 6, 8, 9); conspiracy to possess and to transfer machine guns and silencers, in violation of 18 U.S.C. 371 (Count 13); possession of nine unregistered machine guns and five unregistered silencers, in violation of 26 U.S.C. 5861(d) and 5871 (Counts 14-15); transfer of those same weapons, in violation of 18 U.S.C. 922(a)(5) and 26 U.S.C. 5861(e) and 5871 (Counts 16-19); transporting over $5,000 in cash to the Bahamas without filing the required currency report, in violation of 31 C.F.R. 103.23(a), 103.25(b), 103.49, and 31 U.S.C. 5316 (Count 20); aiding and abetting an individual to travel interstate for the purpose of promoting the distribution of marijuana, in violation of 18 U.S.C. 1952(a)(3) (Count 23); filing false corporate tax returns, in violation of 26 U.S.C. 7206(1) (Counts 39-41, 43); aiding the preparation of a false corporate tax return, in violation of 26 U.S.C. 7206(2) (Count 42); obstruction of justice, in violation of 18 U.S.C. 1503 (Count 47); and subornation of perjury, in violation of 18 U.S.C. 1622 (Count 48).

[3] An unrelated aspect of this case is currently before the court of appeals. The government has appealed (No. 85-1001) from an order of the district court disqualifying the Assistant United States Attorney and the case agents because they inadvertently viewed documents protected by the attorney-client privilege. The documents were contained in a box of papers provided to the government by the court after the court head supposedly removed all documents protected by the privilege. This appeal is still pending, as are defense motions in the district court to dismiss the indictment and disqualify the United States Attorney's office on account of this incident.

SUMMARY OF ARGUMENT

This Court's decisions in *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), and *Fisher* v. *United States*, 425 U.S. 391, 409 (1976), make it more than clear that the Fifth Amendment does not protect the contents of records voluntarily prepared before a subpoena for them is issued. The Fifth Amendment's provision that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself" was intended to preclude the practice of forcing suspects "to admit guilt from their own lips." *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976), quoting *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974). The privilege therefore applies only when the government compels an individual to make a self-incriminating testimonial communication.

When an individual voluntarily prepares, collects, or maintains documents, no compulsion is present, and the Fifth Amendment privilege does not apply. If the individual is subsequently served with a subpoena duces tecum seeking those documents, he is compelled by the subpoena to produce them but not "to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the [individual], for the privilege protects a person only against being incriminated by his own compelled testimonial communications." *Fisher* v. *United States*, 425 U.S. 391, 409 (1976). Accord, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 5-7. In short, the Fifth Amendment privilege does not shield the contents of documents that were voluntarily prepared, collected, and maintained, because the contents of such documents are not the product of proscribed

government compulsion. This broad principle obviously applies whether or not the person upon whom the subpoena is served is the author or owner of the documents.

The court of appeals refused to heed the teaching of *Doe* and *Fisher* for two invalid reasons. First, the court relied (Pet. App. 6a-10a) on the rule derived from *Boyd* v. *United States*, 116 U.S. 616 (1886), that private books and papers may not be subpoenaed. The court of appeals noted (Pet. App. 10a) that *Boyd* has never been expressly overruled and that its teaching served to protect personal privacy (Pet. App. 11a). *Fisher* and *Doe* leave no doubt, however, that *Boyd*'s interpretation of the privilege is no longer good law. Furthermore, the view that the Fifth Amendment privilege provides a generalized protection for personal privacy is incompatible with decisions of this Court holding that testimony can be compelled pursuant to a grant of immunity (*Kastigar* v. *United States*, 406 U.S. 441 (1972)), and that private records may be taken in a search (*Andresen* v. *Maryland*, *supra*).

Second, the court of appeals interpreted *Doe* as applying only to documents held by "an artificial entity, whether a corporation, partnership, or sole proprietorship" (Pet. App. 10a) and not to records held by an individual. *Doe*, however, drew no such distinction. Moreover, a sole proprietorship is not an artificial entity. A sole proprietorship has no legal existence apart from its owner; it is simply a term used to describe a business conducted by a person in his personal capacity rather than through a corporation or partnership. Thus, there is no meaningful distinction between the sole proprietorship records sought in *Doe* and the "personal" business and financial records that are in dispute here.

While it is our submission that the Fifth Amendment does not protect the contents of any papers created without government compulsion, a zone of privacy rationale would not in any event support recognition of the privilege in a case like this. The subpoena called only for common types of business or financial records, such as sales contracts, financial statements, and deeds. It did not seek records like diaries or personal letters that touch upon the more intimate aspects of an individual's life.

ARGUMENT

THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION DOES NOT PROTECT THE CONTENTS OF DOCUMENTS THAT WERE NOT PREPARED UNDER GOVERNMENT COMPULSION

The court of appeals in this case held that the Fifth Amendment privilege protects the contents of voluntarily prepared business and financial records. This view of the privilege is clearly wrong and has been emphatically rejected by this Court.[4]

A. The Fifth Amendment provides that "[n]o person * * * shall be compelled in any criminal case to

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[4] This case is not moot despite respondent's indictment (see pages 5-6 & note 2, *supra*). The grand jury did not charge respondent with any violations pertaining to his personal tax liability. In connection with that continuing investigation, the grand jury still wishes to examine the records that were subpoenaed in March 1984 and that are at issue here. The government may also wish to issue a trial subpoena for the same documents if the trial of the pending charges is delayed until after the decision in the instant case or if, because of mistrial or reversal on appeal, the charges are retried at some later date.

be a witness against himself." As the Court often has noted, the development of this protection was in part a response to certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber, " 'which placed a premium on compelling subjects of the investigation to admit guilt from their own lips.' " *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976), quoting *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974). This constitutional prohibition "demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966).

Consistent with the language and history of the Fifth Amendment, this Court has repeatedly indicated that the privilege against self-incrimination applies only when the accused is compelled to make an incriminating statement. See, *e.g.*, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 5; *Andresen*, 427 U.S. at 477; *Fisher* v. *United States*, 425 U.S. 391, 399 (1976); *Olmstead* v. *United States*, 277 U.S. 438, 462 (1928). "[U]nless incriminating testimony is 'compelled,' any invasion of privacy is outside the scope of the Fifth Amendment's protection." *Andresen*, 427 U.S. at 477.

This Court has also consistently held that the privilege applies only when the accused is forced to make a testimonial communication and not when he is compelled to become the source of "real or physical" evidence. See *Gilbert* v. *California*, 388 U.S. 263, 265-267 (1967); *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967); *Schmerber* v. *California*, 384 U.S.

757, 764 (1966); *Holt* v. *United States*, 218 U.S. 245 (1910).

It follows from these principles that the Fifth Amendment does not protect an individual against governmental use of incriminating documents voluntarily prepared by him, and that a subpoena for such documents may not be resisted solely because of the self-incriminatory potential of their contents. Although the act of turning over a document pursuant to subpoena is most assuredly compelled, it involves no testimony about the *contents* of the document, but merely their physical delivery. And to the extent that the document itself is testimonial in nature, the Fifth Amendment is inapplicable because the creation of the document did not spring from the compulsion of the subpoena. As one leading authority has stated (*McCormicks Handbook of the Law of Evidence* § 128, at 269 (E. Cleary 2d ed. 1972)), preparation of such documents

> may or may not have been testimonial, depending upon whether [the author] intended that the transcription serve the function of communicating his thoughts to another individual, but in any event authorizing the use of such transcriptions would not encourage police to exert the types of coercion that the privilege historically protected against, because by definition these transcriptions would have been made before the opportunity for coercion existed.

B. Any doubt that the contents of preexisting business or financial documents are not privileged under the Fifth Amendment was dispelled by this Court's decisions in *Fisher* and *Doe*. In *Fisher*, taxpayers under investigation by the Internal Revenue Service retrieved papers from their accountants and delivered them to their attorneys (425 U.S. at 394). None of

the documents was prepared by the taxpayers, but the documents contained information taken from the taxpayers' books and records (*ibid.*). The Court held that the attorneys could not resist an IRS summons on the ground of attorney-client privilege because the Fifth Amendment would not have prevented compelled disclosure of the documents if they had remained in the possession of the taxpayers themselves. The Court explained (*id.* at 409):

> A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications.

The Court went on to stress that the Fifth Amendment does not protect any privacy interest in the contents of voluntarily prepared documents even when the documents have been written by the person asserting the privilege (425 U.S. at 410 n.11). Rather, the Court observed, the privilege applies only when the accused is compelled to make a testimonial communication that is incriminating (*id.* at 399, 408), and therefore "unless the Government has compelled the subpoenaed person to write the document * * * the fact that it was written by him is not controlling with respect to the Fifth Amendment issue" (*id.* at 410 n.11). The Court reserved the possibility, however, that in some circumstances the compelled

act of producing a document pursuant to subpoena might be considered the equivalent of incriminating testimony—either because the act concedes "the existence of the papers demanded and their possession or control by the taxpayer" or because it serves to authenticate them. *Id.* at 410.

Fisher's explication of the Fifth Amendment privilege made perfectly clear that while the act of producing a document might in some circumstances be tantamount to "testimony" within the protection of the privilege, a person cannot avoid compliance with a documentary subpoena based solely upon the contents of a document that was not prepared under government compulsion. However, while *Fisher*'s reasoning had implications extending far beyond the particular situation in that case, the Court concluded its opinion by stating (425 U.S. at 414):

> Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his "private papers," see *Boyd* v. *United States*, 116 U.S. at 634-635.

Seizing on this passage, several lower courts held in the wake of *Fisher* that the Fifth Amendment privilege shielded the contents of voluntarily prepared records under a "protection-of-private-papers principle" derived from *Boyd*. *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 332-333 n.7 (3d Cir. 1982), rev'd in part and aff'd in part *sub nom. United States* v *Doe*, No. 82-786 (Feb. 28, 1984); see also *United States* v. *Miller*, 660 F.2d 563, 566-567 (5th Cir. 1981); *United States* v. *Davis*, 636 F.2d 1028, 1043 (5th Cir.), cert. denied, 454 U.S. 862 (1981). We therefore petitioned for certiorari in

Doe to resolve the question "whether the Fifth Amendment protects the contents of an individual's business records" (Pet. at 9, *United States* v. *Doe*, *supra*).

The Court granted review and unambiguously answered that question, holding that the contents of such records are not protected. The Court wrote (*United States* v. *Doe*, slip op. 5-7; footnotes omitted):

> The Court in *Fisher* expressly declined to reach the question whether the Fifth Amendment privilege protects the contents of an individual's tax records in his possession. The rationale underlying our holding in that case is, however, persuasive here. As we noted in *Fisher*, the Fifth Amendment protects the person asserting the privilege only from *compelled* self-incrimination. 425 U.S., at 396. Where the preparation of business records is voluntary, no compulsion is present.
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> * * * * *
>
> Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged.

Justice O'Connor filed a separate concurring opinion "to make explicit what [was] implicit in the [Court's] opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind." See *United States* v. *Doe*, *supra*.

Although three members of the Court dissented in part, none suggested that the contents of voluntarily prepared business records enjoy any Fifth Amendment protection. In fact, Justice Marshall, joined by Justice Brennan, pointedly noted (*Doe*, slip op. 2; footnotes omitted) that "the documents at stake here are business records which implicate a lesser degree of concern for privacy interests than, for example, personal diaries."

C. One of the reasons given by the court of appeals for refusing to follow the teaching of *Fisher* and *Doe* was that, because this Court has never expressly overruled *Boyd*, it was free to follow *Boyd*'s conflicting interpretation of the Fifth Amendment privilege (see Pet. App. 6a-10a). But while this Court has not overruled *Boyd* in so many words, there can be no doubt that *Boyd*'s interpretation of the Fifth Amendment is erroneous and should not be followed.[5]

1. As this Court has pointed out (*Fisher*, 425 U.S. at 408-409), *Boyd* was built upon legal foundations that have long since been obliterated. In *Boyd*, a partnership was believed to have fraudulently evaded paying the tariff on imported plate glass. The penalty for this offense was forfeiture of the imported goods, and therefore the government seized the glass and instituted forfeiture proceedings. Pursuant to statute, the district court ordered production of invoices that the government alleged would establish fraudulent nonpayment of duties. This same statute

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[5] In view of the persistent adherence to *Boyd* by some of the lower courts, even though *Boyd*'s interpretation of the Fifth Amendment privilege has been thoroughly discredited, the express overruling of *Boyd* would be appropriate and beneficial.

provided that failure to comply with such an order would be treated as an admission of the government's allegations. The partners complied under protest, and judgment of forfeiture was entered. 116 U.S. at 617-618.

This Court reversed, holding that the order and statute violated the Fourth and Fifth Amendments. The opinion began by stating that the order requiring production of the invoices constituted a search and seizure within the meaning of the Fourth Amendment "because it is a material ingredient, and effects the sole object and purpose of search and seizure" (116 U.S. at 622). Turning to the question whether this search and seizure was "unreasonable," the opinion looked to the common law to determine whether a search for the invoices would have constituted a trespass (*id.* at 622-633). Relying principally upon the English case of *Entick* v. *Carrington*, 19 Howell's State Trials 1029 [C.P. 1765], it concluded that a search and seizure were unreasonable unless the government's title to the items seized was superior to that of the person from whom they were taken. Thus, the government could search for and seize stolen property, since the possessor did not have title (116 U.S. at 624). Likewise, the government could search for and seize goods on which duty was owed, because "the government has an interest in them for the payment of the duties thereon" (*ibid.*). But the government could not search for and seize mere evidence because property law did not give the government title to such items (*id.* at 624-633).

Having concluded that the order compelling production of the invoices had violated the Fourth Amendment, the Court still faced the question

whether their admission in the forfeiture proceeding had been erroneous, since the exclusionary rule for Fourth Amendment violations would not be adopted until 31 years later in *Weeks* v. *United States*, 232 U.S. 383 (1914). Noting (116 U.S. at 633) "the intimate relation[ship] between" the Fourth and Fifth Amendments, the Court held that the admission into evidence of books and papers obtained in violation of the Fourth Amendment constituted a violation of the Fifth Amendment. It stated (116 U.S. at 633): "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

What is perhaps most remarkable about *Boyd* is how little of its reasoning has stood the test of time. Today it is well established (a) that a partnership such as the Boyd firm may not resist production of its records on Fifth Amendment grounds (*Bellis* v. *United States*, 417 U.S. 85 (1974)); (b) that an order compelling production of invoices is not a search or seizure because there can be no reasonable expectation of privacy in such documents, which are knowingly exposed to the public (see *United States* v. *Miller*, 425 U.S. 435, 440-443 (1976); *Katz* v. *United States*, 389 U.S. 347, 351-352 (1967)); (c) that, even assuming such an order constituted a search and seizure, the Fourth Amendment permits the seizure of "mere evidence" (*Warden* v. *Hayden*, 387 U.S. 294 (1967)); (d) that, again assuming that such an order was a search and seizure, the Fifth Amendment was not violated because no testimonial communication was compelled (*Andresen* v. *Maryland*, *supra*); and (e) that the introduction of evidence obtained in violation of the Fourth Amendment does

not violate the Fifth Amendment (see, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)).

Moreover, the view that *Boyd* provided special protection for private papers, as opposed to other "mere evidence," is not even supported by *Boyd*'s reasoning. *Boyd* did not rest upon the special status of books and records but upon the fact that the government did not have superior title to and consequently could not seize mere evidence. As the Court stated in *Gouled* v. *United States*, 255 U.S. 298, 309 (1921) (emphasis added), which reaffirmed *Boyd* and applied it to a traditional search and seizure conducted pursuant to a facially valid warrant:

> *There is no special sanctity in papers, as distinguished from other forms of property*, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized, * * * and lottery tickets, under a statute prohibiting their possession with intent to sell them * * * and we cannot doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the Government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds.

During the era when *Boyd* held sway, seizures of incriminating papers were consistently upheld in cases such as *Marron* v. *United States*, 275 U.S. 192 (1927); *United States* v. *Lefkowitz*, 285 U.S. 452, 465-466 (1932); and *Abel* v. *United States*, 362 U.S. 217, 238 (1960), subject only to the then-prevailing

requirement that the papers constitute instrumentalities of crime rather than "mere evidence." All these cases refute the notion that *Boyd* conferred special status upon papers either for Fourth or Fifth Amendment purposes.

2. In recent years, this Court has made it more than clear that *Boyd's* interpretation of the Fifth Amendment privilege is no longer good law. In *Fisher*, the Court noted (425 U.S. at 408) that "[t]he pronouncement in *Boyd* that a person may not be forced to produce his private papers has * * * often appeared as dictum in later opinions of this Court." However, the Court explained (425 U.S. at 409) that "the foundations for the rule have been washed away." The Court added (*ibid.*):

> In consequence, the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give "testimony" that incriminates him.

The Court also expressly rejected the argument, which the court of appeals in this case adopted (see Pet. App. 11a-12a), that the Fifth Amendment privilege was intended to protect privacy in a generalized way. The *Fisher* court wrote (425 U.S. at 399; footnote omitted):

> Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did

> not involve compelled testimonial self-incrimination of some sort.

Decisions of this Court holding that an individual's papers may be seized pursuant to a search warrant (*Andresen* v. *Maryland*, 427 U.S. 463 (1976)) and that testimony otherwise protected by the Fifth Amendment may be compelled pursuant to a grant of immunity (*Kastigar* v. *United States*, 406 U.S. 441 (1972)) also leave no room to argue that the Fifth Amendment privilege exists for the independent purpose of protecting personal privacy.

Following *Fisher*, *Doe* further confirmed *Boyd*'s demise. Faced with a court of appeals' decision that "continued to recognize *Boyd*'s protection-of-private-papers principle" (680 F.2d at 332-333 n.7), the Court again made clear that this view of the Fifth Amendment privilege had been discredited (*Doe*, slip op. 5-6 & nn.8, 10). The Court noted (*id.* at 7 n.10) that *Andresen* had "dismissed" the argument that dicta from later cases continued to support *Boyd*. And, the Court continued (*Doe*, slip op. 7 n.10):

> Although *Andresen* involved a search warrant rather than a subpoena, the underlying principle is the same in this context. If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.

D. The court of appeals' second reason for refusing to apply *Doe* in this case was that *Doe* "merely reiterated the well-established premise that an individual holding the documents of an artificial entity, whether a corporation, partnership or sole proprietorship, cannot assert a fifth amendment privilege" (Pet. App.

10a). It is abundantly clear, however, that *Doe* did not treat the individual whose business records were subpoenaed in that case as an "artificial entity." Nowhere in the Court's opinion is there a hint of a distinction between the records of a sole proprietorship and an individual's business records. On the contrary, the Court referred interchangeably to the records in *Doe* as "the business records of a sole proprietorship" (slip op. 1) and "his [*i.e.*, the respondent's] business records" (*id.* at 11 & n.17). Moreover, the Court held that in *Doe* for the act of producing the subpoenaed records, immunity was required without suggesting that this conclusion was at all inconsistent with this Court's line of cases that had firmly established that the custodian of the records of an "artificial entity," such as a corporation or partnership, may be compelled to comply with a documentary subpoena without immunity of any kind. See *Fisher*, 425 U.S. at 408, 413. If the Court had regarded the sole proprietorship as an "artificial entity," then the act of production would not have been privileged.

In any event, the court of appeals' description of a sole proprietorship as an "artificial entity" (Pet. App. 10a) is flatly wrong, and its distinction between the business records of a sole proprietorship and an individual's business or financial records makes no sense. A sole proprietorship is not an artificial entity; it "has no legal existence apart from its owner." *In re Grand Jury Empanelled February 14, 1978*, 597 F.2d 851, 859 (3d Cir. 1979). "Sole proprietorship" is simply a term used to describe a business conducted by an individual in his personal capacity rather than through a partnership or corporation The assets and debts of the sole proprietorship are those of the individual owner and vice versa The

sole proprietorship dies with the owner. The sole proprietorship does not pay taxes or even file a separate tax return; instead, its income is taxable to the owner. A person who owns a sole proprietorship is under no obligation to separate records relating directly to his business from any of his other financial records. Nor is a person who owns several separate businesses that are run as sole proprietorships required to segregate the records of each. In such situations, all of the assets, liabilities, and documents reflecting them are regarded for virtually all legal purposes—*e.g.*, taxes, creditors' rights, inheritance, alimony and child support—as those of the individual.

Even where the individual segregates the records of his businesses, it makes no sense to distinguish between the records of a sole proprietorship and the business or financial records of the individual. For example, documents showing income received by the individual show income on which the "sole proprietor" may draw. Likewise, records memorializing the individual's debts necessarily reflect the "sole proprietor's" liabilities. And finally, assuming (as the indictment alleges) that respondent earns his income from illicit drug transactions and invests the proceeds in, for example, real estate, then he is as much a "sole proprietor" of drug and real estate ventures as the respondent in *Doe* was of his businesses. The distinction sought to be drawn by the court of appeals is thus wholly without substance.[6]

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[6] Respondent maintains (Br. in Opp. 13-14) that this distinction is analogous to the distinction in First Amendment law between commercial and noncommercial speech. There are two glaring flaws in this comparison. First, the court of appeals in this case did not distinguish between commercial and noncommercial records, for there can be no doubt that the subpoenaed records are of a commercial or business na-

E. Under the logic of *Fisher*, *Andresen*, and *Doe*, the contents of even the most personal papers would not appear to be privileged under the Fifth Amendment. See *Doe*, slip op. (O'Connor, J., concurring); *United States* v. *Nobles*, 422 U.S. 225, 233 n.7 (1975). And in our view, it would be unjustified to extend the Fifth Amendment privilege beyond its traditional role of protecting against compelled testimonial disclosures, in order to serve privacy interests associated with particular types of documents. In the first place, as we previously noted (page 20, *supra*), the privacy-protection component thereby injected into Fifth Amendment analysis would be entirely incompatible with the settled principle that disclosure can be compelled through an adequate grant of immunity. Beyond that, use of the Fifth Amendment privilege for this purpose is probably unnecessary. Certainly it is not immediately apparent why unreasonable and unjustified official examination of intimately private documents cannot be adequately controlled through application of First and Fourth Amendment principles, which after all embody the relevant policies. For example, it may be appropriate, as a matter of Fourth Amendment law, to require an exceptionally high showing of need before government officials may reasonably be permitted to examine the contents of a personal diary; but it makes absolutely no sense, in terms of privacy protection concerns, to make the right to read the diary turn upon whether it is found during a lawful search of an automobile or produced pursuant to a subpoena.

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ture (see Pet. App. 18a-20a). Second, while the First Amendment undoubtedly protects the contents of speech, the Fifth Amendment privilege merely protects against compelled testimonial self-incrimination.

In any event, the documents at issue in this case are of a business or financial nature [7] and do not touch upon "the more intimate aspects of one's life." [8]

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[7] Respondent has contended (Br. in Opp. 4-5 (emphasis in original)) that "this case involves *personal* records, not 'financial records' nor 'business records' as petitioner would prefer to describe them." Respodent's assertion is highly misleading. To be sure, the subpoena and the lower court opinions described the records as "personal." But all that this description meant was that they were not the records of any corporation, partnership, or identified sole proprietorship. The suggestion that the subpoenaed records are not "financial" or "business" documents is flatly wrong, as a brief examination of the subpoena (Pet. App. 18a-20a) will reveal.

[8] Indeed, as the district court observed (Pet. App. 14a), many of the documents are duplicates of documents held by third parties, such as respondent's bank. Accordingly, respondent has no legitimate privacy expectation in the contents of those documents. As the Court explained in *United States* v. *Miller*, 425 U.S. at 442-443, where it was argued that an individual had a legitimate expectation of privacy in records kept by his bank:

> Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.

Although *Miller* speaks only of bank records, its teaching applies with equal force to each of the categories of documents at issue in this case. The bulk of the documents subpoenaed are records of commercial transactions that by their nature require disclosure to third parties, often total strangers. There is simply no reasonable expectation of privacy inherent in documents of this kind.

Fisher, 425 U.S. at 425-427 (Brennan, J., concurring); see also *Doe*, slip op. 2 (Marshall, J., dissenting); *Andresen*, 427 U.S. at 486 (Brennan, J., dissenting). In Judge Friendly's apt phrase, the sort of documents involved here—such as sales contracts, financial statements, and deeds (see Pet. App. 17a-20a)—are not "the outpourings of an individual's soul." Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 703 (1968).[9]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[9] Respondent has attempted (Br. in Opp. 12) to pass off the records of his illegal drug deals as "tantamount" to a "private diary." We very much doubt, however, that drug ledgers are what members of this Court had in mind in suggesting that the contents of some intimate documents may enjoy Fifth Amendment protection. See *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 2 (Marshall, J., dissenting); *Andresen* v. *Maryland*, 427 U.S. 463, 486 (1976) (Brennan, J., dissenting).

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